

## CHAPTER 11. WHISTLEBLOWER PROTECTION PROGRAM (AIR CARRIER)

### SECTION 1. PROGRAM OVERVIEW

**1. APPLICABILITY.** This chapter contains direction and guidance for aviation safety inspectors (ASI) about the Whistleblower Protection Program (WBPP). The WBPP provides protection against discrimination for employees of air carriers, employees of contractors to air carriers, and employees of subcontractors to air carriers, who report air safety information to their employer or to the Federal government.

### **3. BACKGROUND.**

*A. Legislative History.* The WBPP provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) were not new ideas to Congress. In fact, the concept of providing legislative whistleblower protections for air carrier employees was first introduced as early as 1987, during the 100<sup>th</sup> Congress, in three separate bills. These bills were introduced first by Representative James L. Oberstar, the second by Representative Kleczka and the third bill was introduced by Representatives Glickman and Molinari. All three bills failed in committee. In 1996, during the 104<sup>th</sup> Congress, Representative James E. Clyburn and Senator Kerry both introduced the “Aviation Safety Protection Act of 1996.” Hearings were held by the Committee on Transportation and Infrastructure Subcommittee on Aviation. The Senate bill was referred to the Aviation Subcommittee of the Senate Commerce, Science, and Transportation Committee. Both the House and Senate 1996 bills failed in committee. In 1997, during the 105<sup>th</sup> Congress, the “Aviation Safety Protection Act of 1997” (H.R. 915) was introduced by Representatives Boehlert and Clyburn; Senator Kerry introduced the Senate version as S. 100. Again, both of these bills failed in the conference committee. Finally, on March 3, 1999, during the 106<sup>th</sup> Congress, Representative Boehlert and Clyburn introduced H.R. 953, Aviation Safety Protection Act, which resulted in H.R. 1000, (AIR 21). Based upon the conference committee with Senate bill S. 82, AIR 21 was agreed to and passed by the House and Senate and became law when H.R. 1000 was signed by the President on April 5, 2000. H.R. 1000

became Public Law (PL) 106-181, which was subsequently codified as Title 49 of the United States Code (49 U.S.C.) § 42121. (See Figure 11-1, Title 49 of the United States Code (49 U.S.C.) Section 42121.)

*B. Discrimination Against Whistleblowers.* Prior to the enactment of the law, air carrier employees and employees who worked for a contractor or subcontractor to an air carrier were not protected from discrimination by the Department of Labor (DOL) when they reported safety violations or alleged safety violations. Many employees did not report safety concerns and alleged violations because of fear of reprisal, up to and including losing their jobs. As a result, the Federal Aviation Administration (FAA) was not receiving valuable air carrier safety and security information from these employees.

*C. The Whistleblower Protection Program.* Title 49 U.S.C. § 42121 provides for the protection of employees that provide, caused to be provided, or are about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal government information relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal law relating to air carrier safety or any other law of the United States; or has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.

*D. Eligibility.* To be eligible for protection under the WBPP, an air carrier, contractor, or subcontractor employee must have been engaged in a protected activity (see Figure 11-1, paragraphs (a)(1) through (4)), such as reporting an alleged violation related to air carrier safety, and believe they are or have been discriminated against for engaging in the protected activity.

*E. Personal Remedy.* A personal remedy for discrimination is available only through the DOL. Complainants that wish to seek a personal remedy for the alleged discrimination activity must file a complaint with the DOL through the Occupational Safety and Health Administration (OSHA) within 90 days of the date of the alleged discrimination event. A discrimination event is the reprisal, discipline, and/or personnel action that the employee believes resulted from their reporting the safety information or other information related to air carrier safety, such as air carrier security information.

**NOTE: Personal safety issues are not related to air carrier safety.**

## 5. THE LAW.

*A.* Section 519 of PL 106-181 is codified as 49 U.S.C. § 42121 and § 46301 (see Figures 11-1 and 11-2, Title 49 of the United States Code (49 U.S.C.) Section 46301, Paragraph (a)(1)(A)). Title 49 U.S.C. § 42121 provides protection against employer discrimination for employees who provide safety information (Figure 11-1).

*B.* Section 46301 paragraph (a)(1)(A) provides for civil penalties to be assessed against persons who violate the whistleblower protection provisions (Figure 11-2).

*C.* Additionally, 49 U.S.C. § 42121 paragraph (b)(3)(C) contains a frivolous complaint provision. If the Secretary of Labor finds that a complaint filed under 49 U.S.C. § 42121 paragraph (b)(1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding \$1,000.

## 7. LEGISLATIVE AUTHORITY AND AGENCY RESPONSIBILITIES.

*A. Department of Labor.* The statute assigns responsibility to the Secretary of Labor to investigate allegations of discrimination and, if there is a reasonable belief that a violation has occurred, to issue an order of relief.

*B. Occupational Safety and Health Administration (OSHA) Delegated Authority.*

(1) On July 18, 2000, the Secretary of Labor delegated authority and assigned responsibility for the enforcement of the air carrier WBPP provisions of

49 U.S.C. § 42121 to the Assistant Secretary of OSHA, Secretary's Order 3-2000, Delegation of Authority and Responsibility to the Assistant Secretary for Occupational Safety and Health (Figure 11-1). This order also authorizes the Assistant Secretary to redelegate authority to OSHA regional directors. Subsequently, the Assistant Secretary of OSHA issued Directive Number DIS 0-0.8, Whistleblower Investigations Manual. The directive assigns responsibility to the OSHA National Office of Investigative Assistance to develop policies and procedures for whistleblower programs, provide training and technical assistance, and to maintain a database on cases and re-delegates authority to OSHA regional administrators to issue findings and orders on behalf of the Assistant Secretary. OSHA regional offices have overall responsibility for air carrier whistleblower investigations and whistleblower outreach programs within their geographic area. The authority to issue determinations and approve settlements filed is also delegated. The directive also permits the OSHA regional administrator to sub-delegate these authorities to the OSHA assistant regional commissioner or area assistance director.

(2) OSHA has the responsibility to investigate employee complaints of discrimination and may order a violator to take affirmative action to abate the violation, reinstate the complainant to his or her former position with back pay, and award compensatory damages, including attorney fees. OSHA regulations are codified as Title 29 of the Code of Federal Regulations part 1979, Procedures for the Handling of Discrimination Complaints under Section 519 of AIR 21.

### *C. FAA's Responsibilities.*

(1) The law requires the Secretary of Labor upon receipt of a complaint to notify, in writing, the Administrator of the FAA of the filing of the complaint, of the allegations contained in the complaint (information relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal law relating to air carrier safety or any other law of the United States), and of the substance of evidence supporting the complaint.

(2) FAA has responsibility to investigate complaints related to air carrier safety and has authority under the FAA's statute to enforce air safety regulations and issue sanctions to airmen and air carriers for noncompliance with these regulations.

FAA enforcement action may include air carrier and/or airman certificate suspension and/or revocation and/or the imposition of civil penalties (see FAA Order 2150.3, Compliance and Enforcement Program, as amended).

(3) In addition to FAA's enforcement action related to FAA regulations, AIR 21 also amended 49 U.S.C. § 46301, FAA's civil penalty authority, to include civil penalties for violations of 49 U.S.C. § 42121, once the Secretary of Labor's Order of a finding becomes final.

*D. Transportation Security Administration (TSA).* Prior to the enactment of the Aviation and Transportation Security Act (ATSA), which established the TSA, whistleblower complaints concerning alleged violations of air carrier security rules under Title 14 of the Code of Federal Regulations (14 CFR) parts 107 and 108 were investigated by the FAA's Office of Civil Aviation Security Operations. These rules of the FAA and the responsibility for enforcement of these rules were transferred to TSA when TSA assumed FAA's civil aviation security function on February 17, 2002. TSA issues and administers Transportation Security Regulations (TSR), which are codified in Title 49 of the Code of Federal Regulations (49 CFR), Chapter XII, parts 1500 through 1699. TSA has responsibility to investigate complaints related to air carrier security and to enforce air carrier security regulations under the Aviation and Transportation Security Act, PL 107-71, dated November 19, 2001.

## 9. FAA'S RELATIONSHIP WITH DOL/OSHA.

*A. Memorandum of Understanding (MOU).* FAA and the Secretary of Labor, through OSHA, both have responsibilities relating to 49 U.S.C. § 42121. In March 2002, the FAA and OSHA signed an MOU to facilitate coordination and cooperation concerning the protection of employees who provide air safety information under the provisions of Section 519 of AIR 21, 49 U.S.C. § 42121. Although FAA and OSHA will carry out their statutory responsibilities independently, the agencies agreed that administrative efficiency and sound enforcement policies will be maximized by cooperation and the timely exchange of information in areas of mutual interest.

*B. MOU Elements.* The MOU provides for a process that FAA and OSHA agreed to follow. The elements of the agreement are:

(1) FAA and OSHA will establish a procedure for coordinating and supporting enforcement of 49 U.S.C. § 42121.

(2) OSHA agrees to promptly notify the FAA national headquarters WBPP of any discrimination complaints filed with the DOL under 49 U.S.C. § 42121.

(3) OSHA will promptly provide FAA with a copy of the complaint, findings, preliminary orders, investigation reports, and orders associated with any hearing or administrative appeal related to the complaint.

(4) OSHA will also keep FAA currently informed of the status of any administrative or judicial proceeding seeking review of an order of DOL issued under 49 U.S.C. § 42121.

(5) When an individual directly notifies FAA of alleged discrimination that involves air carrier safety, FAA will investigate the safety complaint and will provide OSHA with a copy of the individual's allegations.

(6) FAA will inform the individual that a personal remedy for discrimination is available only through DOL and that the individual should personally contact DOL.

(7) FAA will provide the individual with the local address and telephone number of the nearest OSHA office and advise the individual that the law requires that complaints be filed with OSHA within 90 days of the alleged discrimination.

(8) FAA and OSHA agree to cooperate with each other to the fullest extent possible in every case of alleged discrimination involving an air carrier, contractor, or subcontractor employee.

(9) Each agency agrees to share all information it obtains relating to each complaint of discrimination and will adopt mutually agreeable procedures for the protection of information that either agency deems confidential.

(10) Each agency shall designate and maintain points of contact within its national headquarters and regional offices for purposes of implementation of this MOU and continued program oversight.

(11) Matters affecting program procedures and policy issues will be handled by the respective national headquarters office of each agency.

## **11. DUTIES AND RESPONSIBILITIES OF THE NATIONAL WBPP OFFICE, AFS-200W.**

*A.* The WBPP, AFS-200W, was officially established on July 29, 2002 and is physically located in the Air Transportation Division of the Flight Standards Service. The program is responsible for developing national policy, interagency procedures between FAA and the DOL/OSHA, and providing guidance for investigations of air carrier whistleblower safety and security complaints and all other related activities. These procedures set forth a process for coordinating and supporting enforcement of 49 U.S.C. § 42121. The WBPP is the agency's liaison to the DOL and OSHA on all matters concerning the FAA air carrier WBPP and the joint FAA/OSHA Aviation Safety and Health Program (ASHP). The WBPP is responsible for the review, coordination, and assignments of whistleblower safety complaints received from employees of air carriers, air carrier contractors, and air carrier subcontractors and is responsible for the management oversight of the FAA's WBPP hotline and implementation of MOUs with OSHA.

*B.* The FAA ASHP is a second program under the responsibility of AFS-200W. The ASHP is responsible for coordinating with OSHA and resolving jurisdictional authority for the investigation of aviation industrial accidents, injuries, and complaints and provides advice to OSHA concerning whether the application of an OSHA requirement to the working conditions of aviation employees would compromise aviation safety. (See FAA Order 8400.10, Air Transportation Operations Inspector's Handbook, vol. 1, ch. 7, TBD.)

## **13. DUTIES AND RESPONSIBILITIES OF THE REGIONAL WHISTLEBLOWER COORDINATORS.** The Regional Whistleblower Coordinators (RWBC):

*A.* Serve as the regional focal point on all matters concerning air carrier WBPP complaints within their regional area of responsibility.

*B.* Provide advice and assistance to OSHA regional and field investigators, and air carriers, air carrier contractors, and air carrier subcontractor employees within their respective regions concerning alleged violations of FAA orders, standards, and regulations or

any other provision of Federal law relating to air carrier safety.

*C.* Receive, assign, track, coordinate, review, and evaluate all whistleblower complaints within their regional area of responsibility.

*D.* Coordinate, obtain, and share all information relating to whistleblower safety complaints with OSHA.

*E.* Provide technical information and guidance to FAA field office personnel and ensure that field inspectors thoroughly understand their responsibilities associated with conducting a whistleblower investigation.

*F.* Answer public inquiries about the WBPP.

*G.* Ensures all whistleblower complaints assigned to FAA organizations in their respective regions are adequately investigated and responded to within established time lines.

*H.* Ensure that each safety allegation in the complaint has been adequately investigated and addressed and appropriate action is being or has been taken.

*I.* Review the district office's response to each safety allegation for completeness and action taken; return for further investigation if necessary.

*J.* When the RWBC finds the responses acceptable, the coordinator prepares a memorandum from the regional division manager to the Director of Flight Standards Service (AFS-1), Attn: WBPP, AFS-200W. This memorandum summarizes the investigation results, includes division manager concurrence, and includes the district office's report as an attachment.

## **15. ORGANIZATIONAL RESPONSIBILITIES.**

The FAA WBPP is an Agency program that encompasses many FAA organizations and coordinates with other Federal agencies such as DOL, OSHA, Department of Transportation (DOT) Office of the Inspector General (OIG), and TSA. All whistleblower complaints filed under 49 U.S.C. § 42121 must allege a violation related to air carrier safety. Air carrier safety issues are mostly the responsibility of regulation and certification organizations with the majority of whistleblower complaints assigned to AFS. Therefore, on April 17, 2002, the FAA Administrator established the FAA's WBPP under the Associate Administrator for Regulation and Certification, AVR. On July 29,

2002, the Director of AFS established the WBPP, AFS-200W, under the direct line authority of the Air Transportation Division, AFS-200.

#### **17. WHISTLEBLOWER PROTECTION PROGRAM HOTLINE.**

*A.* This hotline is for employees of air carriers, air carrier contractors, and air carrier subcontractors that would like information about the whistleblower program and how to file a complaint:

1-800-255-1111 (Press 1 for main menu then press 5.)

*B.* Regular business hours are Monday through Friday, 8 a.m. until 4 p.m., Eastern Time, except

Federal holidays. After business hours, callers may leave a voice message.

**19. WHISTLEBLOWER PROTECTION PROGRAM WEB PAGE.** For additional information about the WBPP, see the FAA Web site at:

[www.faa.gov/avr/afs/whistleblower/](http://www.faa.gov/avr/afs/whistleblower/)

**NOTE: The FAA Web page contains an electronic whistleblower complaint form. This form should be recommended to employees in lieu of a fax or hard copy by mail. Employees may submit additional documentation to the investigating inspector after the initial complaint is received and assigned.**

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**FIGURE 11-1.**  
**TITLE 49 OF THE UNITED STATES CODE (49 U.S.C.) SECTION 42121**

**TITLE 49. TRANSPORTATION**

**SUBTITLE VII. AVIATION PROGRAMS**

**PART A. AIR COMMERCE AND SAFETY**

**SUBPART II. ECONOMIC REGULATION**

**CHAPTER 421. LABOR-MANAGEMENT PROVISIONS**

**SUBCHAPTER III. WHISTLEBLOWER PROTECTION PROGRAM**

**49 USCS § 42121 (2002)**

**§ 42121. Protection of employees providing air safety information**

(a) Discrimination against airline employees. No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle [49 USCS §§ 40101 et seq.] or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle [49 USCS §§ 40101 et seq.] or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

(b) Department of Labor complaint procedure.

(1) Filing and notification. A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

(2) Investigation; preliminary order.

(A) In general. Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present

**FIGURE 11-1. (Continued)**

statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

**(B) Requirements.**

(i) Required showing by complainant. The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Showing by employer. Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) Criteria for determination by Secretary. The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) Prohibition. Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

**(3) Final order.**

(A) Deadline for issuance; settlement agreements. Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) Remedy. If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to--

- (i) take affirmative action to abate the violation;
- (ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and
- (iii) provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.

**FIGURE 11-1. (Continued)**

(C) Frivolous complaints. If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding \$1,000.

(4) Review.

(A) Appeal to Court of Appeals. Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code [5 USCS §§ 701 et seq.]. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

(B) Limitation on collateral attack. An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

(5) Enforcement of order by Secretary of Labor. Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

(6) Enforcement of order by parties.

(A) Commencement of action. A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(B) Attorney fees. The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(c) Mandamus. Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code.

(d) Non applicability to deliberate violations. Subsection (a) shall not apply with respect to an employee of an air carrier, contractor, or subcontractor who, acting without direction from such air carrier, contractor, or subcontractor (or such person's agent), deliberately causes a violation of any requirement relating to air carrier safety under this subtitle [49 USCS §§ 40101 et seq.] or any other law of the United States.

(e) Contractor defined. In this section, the term “contractor” means a company that performs safety-sensitive functions by contract for an air carrier.

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**FIGURE 11-2.****TITLE 49 OF THE UNITED STATES CODE (49 U.S.C.) SECTION 46301,  
PARAGRAPH (a)(1)(A)****TITLE 49. TRANSPORTATION****SUBTITLE VII. AVIATION PROGRAMS****PART A. AIR COMMERCE AND SAFETY****SUBPART IV. ENFORCEMENT AND PENALTIES****CHAPTER 463. PENALTIES****49 USCS § 46301 (2002)****§ 46301 Civil penalties****(a) General penalty.**

(1) A person is liable to the United States Government for a civil penalty of not more than \$1,000 for violating--

(A) chapter 401 [49 USCS §§ 40101 et seq.] (except sections 40103(a) and (d), 40105, 40116, and 40117), chapter 411 [49 USCS §§ 41101 et seq.], chapter 413 (except sections 41307 and 41310(b)-(f)), chapter 415 (except sections 41502, 41505, and 41507-41509), chapter 417 (except sections 41703, 41704, 41710, 41713, and 41714), chapter 419 [49 USCS §§ 41901 et seq.], **subchapter II or III of chapter 421** [49 USCS §§ 42111 et seq. or 42121], chapter 441 [49 USCS §§ 44101 et seq.] (except section 44109), 44502(b) or (c), chapter 447 (except sections 44717 and 44719-44723), chapter 449 (except sections 44902, 44903(d), 44904, 44907(a)-(d)(1)(A) and (d)(1)(C)-(f), and 44908), or section 47107(b) (including any assurance made under such section) of this title; . . .

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## SECTION 2. INSPECTOR RESPONSIBILITIES AND PROCEDURES

### 1. DEFINITIONS.

*A. Air Carrier.* The whistleblower statute is in 49 U.S.C. and covers retaliatory action by air carriers, their contractors, and their subcontractors. The provision that contains the definition of “air carrier” is in part A of Subtitle VII, so the definitions section for that part is applicable. Section 40102(a)(2) of 49 U.S.C. defines “air carrier” as “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.”

*B. Air Transportation.* Foreign air transportation, interstate air transportation, or the transportation of mail by aircraft.

**NOTE: For the employee to be protected under the WBPP, a company does not have to hold an “air carrier” certificate to meet the definition of an air carrier. An employee that alleged his or her company is operating as an “air carrier” without an air carrier certificate and in violation of the rules that require a certificate and operations specifications, may be protected, if it is determined during the investigation that the company meets the definition of an “air carrier.” The rules for air carriers apply to those who are conducting operations that would require an air carrier certificate (see 14 CFR part 119, § 119.5 (l)).**

*C. Air Carrier Employee.*

(1) Title 49 U.S.C., § 42121 provides protection to employees against retaliation by air carriers, their contractors, and their subcontractors, because they provided information to the employer or the Federal government relating to air carrier safety violations, or filed, testified, or assisted in a proceeding against the employer relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other law relating to the safety of air carriers, or because they are about to take any of these actions.

(2) Title 14 CFR part 121, § 121.1 and part 135, § 135.1 both prescribe rules governing “. . . each person employed or used by a certificate holder. . .” It is important to note that if a person is used by an air carrier certificate holder or an air carrier that does not hold a certificate, that person may still be

considered an “air carrier employee” for the purposes of whistleblower protection.

*D. Foreign Air Carriers.* Title 49 U.S.C., § 40102(a)(21) separately defines “foreign air carrier” as a “person, not a citizen of the United States, undertaking by any means, directly or indirectly, to provide foreign air transportation.” Given that Congress specifically defines that an air carrier must be a citizen of the United States, § 42121 does not encompass foreign air carriers, except to the extent that they may act as a contractor or subcontractor to a U.S. air carrier.

### 3. PRINCIPAL AND GEOGRAPHIC INSPECTOR(S) RESPONSIBILITIES.

- Inform covered employees of the WBPP.
- Investigate WBPP safety complaints from employees of air carriers, contractors, and subcontractors in accordance with 49 U.S.C. § 42121 and national WBPP policy.
- Keep employees’ names confidential.
- Coordinate and share information concerning WBPP complaints with the OSHA investigators in accordance with national policy and agency-agreed procedures.
- Report through office manager and region to the Director of Flight Standards, AFS-1, Attn: Whistleblower Protection Program, AFS-200W, with the preliminary results of their whistleblower complaint investigation for coordination with the DOL.
- Complete tracking in the Program Tracking and Reporting Subsystem (PTRS).

### 5. INSPECTOR PROCEDURES.

*A. Procedures Upon Receiving Information About a Violation or Alleged Violation.* An employee of an air carrier, contractor, or subcontractor may contact an FAA inspector with information regarding a violation or an alleged violation of an FAA order, regulation, or standard, or any other provision of Federal law relating to air carrier safety. The employee may also request whistleblower protection by DOL. In order for inspectors to adequately advise employees of their rights, inspectors should immediately advise them of the WBPP and for a personal remedy that they should

contact DOL/OSHA as soon as possible (not later than 90 days after the discrimination event).

*B. Opening an Investigation.* A whistleblower complaint investigation should be opened and begun as soon as a complaint is received. Some records to substantiate the complaint may not be available if the inspector waits for a tracking number prior to beginning the investigation. Complaints may be received by FAA headquarters from DOL, reported directly to the FAA, or received by the FAA from any other federal source. Complaints that FAA headquarters receives from DOL will be assigned a tracking number and then forwarded to the appropriate regional office for investigation. Regional offices will forward the complaint to the appropriate field office to initiate the investigation. FAA personnel that receive potential whistleblower complaints directly from the employee or other federal source should begin the safety investigation and notify their RWBC, to initiate coordination procedures with AFS-200W and receive a tracking number.

*C. Conducting an Investigation.* ASIs should use the following general steps when conducting a whistleblower investigation.

(1) Contact the complainant, by the most expeditious means possible (phone, e-mail, etc.).

(2) Ask if they have any additional supporting evidence or can tell you where to look.

(3) Ask if they have any witnesses or other employees that can corroborate the alleged violation(s).

(4) Ask if any other employees are having the same or similar problems.

(5) Conduct a site inspection. Interview company personnel involved and/or other persons that may have knowledge. (Do not release the complainant's name; the FAA/OSHA MOU requires that FAA will keep the complainant's name confidential.)

**NOTE: ASIs should not reveal that they are investigating a whistleblower complaint. ASIs only investigate the safety issues.**

(6) Collect evidence, interview company personnel, other employees, witnesses, and make copies of all relevant information (keep accurate records, names, dates, times, etc.).

(7) Review company manuals and/or records for alleged violations.

(8) Take appropriate enforcement and/or corrective action or close out with no action.

*D. Report Preparation.*

(1) Analyze the results of the investigation. Do not address allegations of discrimination. Only address the alleged violations of FAA orders, standards, regulations, or any other Federal law relating to air carrier safety.

(2) Write a report. List each allegation related to air carrier safety (TSA will investigate security issues). For each allegation:

(a) Summarize the investigation process (e.g., who did you interview, what records/manuals did you review, etc.);

(b) Explain what enforcement action, if any, was taken.

(3) Upon request, share information of your initial findings with OSHA investigators.

(4) Complete PTRS entries. For all activities associated with the WBPP, Operations and Cabin Safety Inspectors should enter the PTRS code 1737, maintenance inspectors should enter the PTRS code 3740, and Avionics inspectors should enter the PTRS code 5740. All whistleblower complaints will be assigned a tracking number to be entered in the National Use Field. In the Misc. Data field, enter "WHISTLE." When the complaint is closed out, enter the results of the investigation in the comments section and use the assigned tracking number in the National Use Field on all associated PTRS actions (e.g., Enforcement Investigation Reports (EIR)).

**NOTE: All national whistleblower tracking numbers begin with WB, then the last two numbers of the fiscal year (FY), then the individual sequence number of complaints received in that FY. There are no spaces between characters. (Example: WB0301 means whistleblower, FY03, first one received.)**

(5) Prepare a memo from the office manager to the regional division manager summarizing preliminary results (if EIR is being processed, summarize the violations and recommended sanctions; if administrative action was taken, attach a copy of the administrative letter). Preliminary results should

indicate details of the investigation with dates, times, and names of persons including witness interviewed and whether the investigation findings substantiated a violation of an FAA order, standard, or regulation or any other Federal law related to air carrier safety. Also include a statement that indicates what type of corrective or enforcement action is planned.

(6) If no action was taken, explain why the employees' allegations were not substantiated.

#### *E. Regional Office Review.*

(1) Regional coordinators will review preliminary results for completeness and action taken.

(2) Regional division managers will review the case and any recommended action.

(a) If the manager does not concur with the results, the manager should return it for further investigation;

(b) If the manager concurs, then the manager should send their concurrence of the investigation to AFS-1, Attention: Whistleblower Protection Program, AFS-200W, within 45 days from the date of the initial assignment memo from AFS-1.

**NOTE: To facilitate the processing of Freedom of Information Act (FOIA) requests, when legal enforcement action was initiated, RWBCs will notify AFS-200W when each enforcement action is closed.**

#### **7. SPECIAL ENFORCEMENT CONSIDERATION.**

FAA Order 2150.3, Compliance and Enforcement Program (as amended), chapter 13, paragraph 1302, contains FAA policy and procedures on providing immunity from enforcement action, in some cases, to persons who provide information about violations. In relation to enforcement matters, information regarding regulatory violations occasionally is offered to an FAA inspector or attorney along with a request that, in exchange for the information, the person making the offer be granted "immunity from prosecution" for his or her participation in the violations. The phrase "immunity from prosecution" ordinarily refers only to criminal matters. The individual usually is seeking an assurance that limited or no FAA civil enforcement action will be taken against him for admitted violations in exchange for information concerning violations by his employer or other members of the aviation community. The term "special enforcement consideration" (SEC) is used here instead of the term

"immunity from FAA civil enforcement action" and covers mitigation of sanction as well as a determination that no enforcement action is warranted. In cases where the employee may have committed a violation under duress, the fact that FAA may not have received the safety information if the complainant had not reported it under the WBPP is a mitigating factor that must be given major consideration in the recommended sanction. Further guidance will be developed specific to whistleblowers.

**9. CIVIL PENALTY.** The FAA may impose a civil penalty after the Secretary of Labor's Order becomes final. This civil penalty is in addition to any enforcement action the FAA may impose for safety violations as well as any abatement action OSHA may impose concerning a finding of discrimination. The FAA will receive a copy of the Secretary of Labor's Order when it becomes final (i.e., all appeals by either party are exhausted). The FAA may then issue the civil penalty for a violation of 49 U.S.C. § 42121 based upon the finding by DOL, in addition to any FAA safety investigation enforcement action the FAA may have previously taken (see 49 U.S.C. § 46301).

**11. TIMELINESS OF COMPLAINT (i.e., OVER 90 DAYS).** It is important that each complaint be thoroughly investigated. FAA still has to investigate the safety issues regardless of whether the complaint is filed in a timely manner or not. OSHA may dismiss the complaint of discrimination as untimely, but may under certain circumstances (i.e., the complainant has a valid reason for not submitting the complaint within 90 days), accept the complaint. Even if the complaint is deemed untimely by OSHA, the complainant is still afforded appeal rights by OSHA.

**13. CONFIDENTIALITY AND PRIVACY ACT.** Whistleblower complaints contain confidential information intended only for the use of agency personnel on a "need-to-know" basis. Unauthorized disclosure of confidential information may constitute a violation of the Privacy Act, Title 5 of the United States Code (5 U.S.C.) § 552a and applicable agency rules of conduct. Any questions concerning the legitimate disclosure of some or all information contained in whistleblower complaints should be directed to the responsible regional counsel's office. Your regional counsel may wish to contact the Enforcement Division, AGC-300, for Legal Enforcement National Policy questions.

**15. FOIA REQUESTS.**

*A.* All requests received under the FOIA for information concerning whistleblower complaint investigations must be sent to FAA Headquarters, ARC-40, FOIA Staff, FAA, 800 Independence Ave., SW., Washington, DC 20591.

*B.* If your office has records on the subject whistleblower investigation, photocopy all records and forward them through your RWBC, who will copy any records the regional office may have. The RWBC will then send the entire package to AFS-200W.

**17. RECORD RETENTION.** All records associated with whistleblower investigations must be kept for 3 years after the investigation is closed.

**19. SHARING OF INFORMATION WITH OSHA.** Upon request, an agent of OSHA may review the investigative file and request copies of any supporting documents. The documents must be requested in writing (an electronic message is adequate and will speed the process), with a certification that they will not be disseminated outside OSHA without the authorization of this agency.

**21. INTERNATIONAL OPERATIONS.** Employees of U.S. air carriers or contractors to U.S. air carriers are covered in all international operations worldwide.

## SECTION 3. COMPLAINT PROCESSING

### 1. FAA PROCESSING.

A. Processing begins when the FAA receives a whistleblower complaint from an air carrier, contractor, or subcontractor employee or from OSHA.

- Normally, complaints are received from the FAA's WBPP hotline, the FAA web electronic complaint form, FAA field and regional offices, OSHA offices, or DOT OIG offices. However, complaints may be received from any person on behalf of the complainant.

B. AFS-200W screens the whistleblower complaint for the following elements.

(1) The complainant must be a covered employee;

(2) The complainant must have been engaged in a protected activity as described in 49 U.S.C. § 42121(a) (i.e., previous to the discrimination event, reported any violation or alleged violation of any FAA order, standard or regulation or any other provision of Federal law or any other law of the United States relating to air carrier safety to their employer or to the Federal government); and

(3) The complainant must believe that they have been discriminated against for engaging in the protected activity. (The employee must be able to show that the employer had knowledge of the protected activity (employee safety report) prior to the alleged discrimination.)

**NOTE: Employees that just want to initially “blow the whistle” and have not been discriminated against for reporting a safety complaint should not file a whistleblower complaint. At this point they are merely reporting an alleged safety violation and should be investigated as a safety-only complaint. However, ASIs should advise them of their rights under the WBPP.**

C. AFS-200W assigns the whistleblower complaint an FAA WBPP tracking number and coordinates it with the U.S. DOL, OSHA.

D. AFS-1 assigns the whistleblower complaint to the FAA regional Flight Standards division manager

that has certificate responsibility or geographic responsibility for investigation of safety allegations.

E. The regional division manager, through the RWBC, tracks and assigns the complaint to the appropriate certificate-holding district office or office with geographic responsibility for investigation of the safety allegations.

F. The field or regional office, if specified by AFS-1, conducts an investigation of each safety allegation in the complaint, interviews witnesses, and collects evidence in the same manner as they would conduct any other safety investigation. (See confidentiality requirements and importance of contacting the complainant first.)

G. The field office takes appropriate corrective or enforcement action if allegations are substantiated and prepares a memo from the office manager to the regional division manager, Attn: WB Coordinator. The response should address each safety allegation, investigative actions, findings, and results, include attachments if necessary. (See inspector procedures.)

H. The RWBC reviews the report for completeness. If the report is unsatisfactory, the RWBC will send it back to the investigating office for further investigation and or clarification. Once the regional division manager concurs with the adequacy and findings of the investigation, then the RWBC prepares a memo from the division manager to AFS-1, Attn: AFS-200W, summarizing the findings. The memo will state whether the investigation revealed any violations and the proposed sanctions for the violations, and that the RWBC concurs with the results of the investigation. The RWBC will also attach the investigating office's memo/report to the memo.

I. The regional office division manager forwards the preliminary results of the investigation within 45 days to AFS-1, Attn: WBPP AFS-200W for tracking and coordination with OSHA.

J. The field office or regional office enters PTRS data. Additionally, the comments section must contain a summary of each safety allegation, how the investigation was conducted, and the results or findings in sufficient detail for the reader to determine that all allegations were properly investigated. The comments section should also state if enforcement action was taken and the proposed recommended

sanction. Attach a copy of the letter if administrative action was taken.

**3. DOL PROCESSING.** Simultaneously, DOL, through OSHA, conducts an investigation concerning the allegations of discrimination.

*A.* OSHA must determine if the case has merit (i.e., is a prima facie case) within 60 days of receiving a complaint or dismiss the complaint as having no merit.

*B.* OSHA may offer a settlement between the parties, or

*C.* Issue a preliminary order of abatement, reinstatement and compensatory damages.

*D.* When the Secretary of Labor's Order of relief becomes final, the FAA may take additional civil penalty action against the company for violating the whistleblower law.